NOS. 75-1905 AND 75-1910

In the Supreme Court of the United States

OCTOBER TERM, 1976

ERNEST R. MULLENAX, PETITIONER

v.

UNITED STATES OF AMERICA

ROBERT E. FORD, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINIONS BELOW

The order of affirmance of the court of appeals is unreported (M. Pet. App. A).[1] The opinion of the district court (M. Pet. App. C) is reported at 404 F. Supp. 413.

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[1]"M. Pet." refers to the petition in No. 75-1905 and "F. Pet." refers to the petition in No. 75-1910.

JURISDICTION

The judgment of the court of appeals was entered on April 15, 1976, and petitions for rehearing with suggestion for rehearing *en banc* were denied on June 2, 1976 (M. Pet. App. D; F. Pet. App. B, C). The petition for a writ of certiorari in No. 75-1905 was filed on July 1, 1976, and the petition in No. 75-1910 was filed on July 2, 1976. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the fraudulent pledge of securities as collateral for a loan constitutes a "sale" under Section 17(a) of the Securities Act of 1933, 15 U.S.C. 77q(a).

2. Whether the district court erred in resolving, without an evidentiary hearing, a claim that testimony given under a statutory grant of immunity had been improperly used by the government in a subsequent prosecution.

3. Whether the district court abused its discretion by granting a jury request for copies of the criminal statutes alleged in the indictment to have been violated, without reinstructing the jury on the elements of those crimes.

4. Whether the court of appeals erred in refusing to remand to the district court for reconsideration of sentencing after reversing several counts against petitioner Mullenax.

5. Whether the evidence proved the single conspiracy charged in the indictment and whether the district court correctly instructed the jury concerning that conspiracy.

STATEMENT

After a jury trial in the United States District Court for the Southern District of New York, petitioners were convicted of conspiracy to commit securities fraud,

in violation of 18 U.S.C. 371, 27 counts of mail and wire fraud, in violation of 18 U.S.C. 1341 and 1343, and 23 counts of securities fraud and the sale of unregistered securities, in violation of 15 U.S.C. 77q, 77e and 77x (M. Pet. 4). Petitioner Ford also was convicted on two counts of making false statements to the Securities and Exchange Commission, in violation of 18 U.S.C. 1001 (F. Pet. 5).[2] Petitioner Mullenax was sentenced to two years' imprisonment, all but six months of which were suspended in favor of two years' probation, and was fined $10,000. Petitioner Ford was sentenced to five years' imprisonment and a $10,000 fine. The court of appeals affirmed the conviction of petitioner Ford on all counts and affirmed the conviction of petitioner Mullenax on the conspiracy count and eight substantive counts. Pursuant to the government's concession, however, the court reversed petitioner Mullenax's conviction on 42 substantive counts that related to events occurring prior to his entry into the conspiracy (M. Pet. 4, n. * * *).

The evidence showed that petitioners were involved in a complex scheme to inflate artificially the price of a shell corporation, Select Enterprises, Inc. ("Select"), whose actual assets were close to worthless.[3] The object of this scheme was to defraud the public by using the inflated stock to purchase assets and secure loans.

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[2]Co-defendants Joe Boyd, Ernest Goodloe, and M. S. Knisely were also convicted of conspiracy and numerous substantive counts of securities fraud. Three other defendants, James Joiner, Alan Segal, and John Wells, pleaded guilty before trial and testified for the prosecution. Seven additional defendants were acquitted at trial.

[3]A complete statement of the evidence at trial is contained in pp. 4-43 of the government's brief in the court of appeals, a copy of which is being lodged with the Clerk of this Court.

The plan commenced in January 1970, when co-defendants Boyd and Joiner acquired all of the stock in a dormant Nevada corporation, Goldfield Candelaria Cooperative Mining Company, Inc., which was renamed "Select." At approximately the same time, co-defendant Goodloe and petitioner Ford sought to acquire assets for Select, which were subsequently listed at fraudulently inflated prices on Select's balance sheets. Co-defendant Knisely was designated as president of Select (Tr. 976, 1394), while co-conspirator Segal engaged in efforts to open an over-the-counter market for Select stock (Tr. 966-968, 977-978).

Select's first balance sheet, issued on January 27, 1970, purported to show that it owned three valuable properties: (1) New Mexico mica mines purchased from C.A. Morris & Company, Inc.; (2) real estate in Midland, Texas, purchased from the South Midland Development Corporation; and (3) Texas oil and gas leases.[4] Petitioner Ford prepared conveyances for the mica mines and oil and gas leases, as well as title opinions on those properties.[5] Although these documents were dated January 23 and 26, 1970, they actually had been signed much later and were backdated by the conspirators after personnel of the Securities and Exchange Commission began to investigate the company.

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[4]The mines were listed as having a value of some $19 million, although they had been almost completely inactive for at least ten years (Tr. 1407, 1434-1447). The real estate was valued on the balance sheet at some $1 million, but in fact it was not worth the $60,000 in taxes then assessed against it (Tr. 948-957). The gas leases were valued at $5 million, but were actually worth no more than $225,000 (Tr. 1518, 1598-1599).

[5]As petitioner Ford was aware, the conveyance of the oil leases was ineffective because their owner had previously agreed to convey a 50 percent interest in them to another party. Nonetheless, the title opinion letter failed to mention this other interest (Tr. 1519-1553).

Using this false balance sheet, Segal was able to initiate a market in Select stock. After trading in the stock began on February 9, 1970, Segal managed to force the price as high as $18 per share before the S.E.C., which had been given copies of Select's balance sheet and other documents by brokers dealing with Segal, began its investigation (Tr. 109-110, 131-132, 145-146, 158, 163-165, 383-384, 447-448).

On March 9, 1970, Boyd appeared before the S.E.C. in Fort Worth, Texas, and made a variety of false statements under oath concerning the financial strength of Select and his financial dealings with Segal. A few weeks later, petitioner Ford met with Boyd, Knisely, Goodloe, and others at his law office in order to compose a new, purportedly "certified" financial statement for Select. This new balance sheet, which included the same overvalued properties as the earlier statement (Tr. 1011-1012, 1376-1380), was submitted to the S.E.C. on April 6, 1970, by Boyd and petitioner Ford. Subsequently, Boyd, in petitioner Ford's presence, gave other false testimony to the S.E.C. (Tr. 742-745, 1222-1229), and petitioner Ford, while not under oath, made false statements to S.E.C. officials concerning Select's title to certain land in California.[6]

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[6]During the period of the S.E.C. investigation, members of the Select group, including petitioner Ford, also tried to acquire other purportedly valuable assets for Select to list on its balance sheet. On February 17, 1970, petitioner Ford met with Hoyt W. L. Brinlee and Joan Vinson, who signed an agreement to sell Select certain tracts of land in Imperial County, California, in return for Select stock. The agreement stated that Brinlee and Vinson were owners of the property although, as petitioner Ford knew, they only held quitclaim deeds to the land. When the "sale" was consummated, petitioner Ford had the two sign warranty deeds rather than the more appropriate quitclaim deeds (Tr. 1194-1197, 1205-1214). The property was listed in Select's balance sheet at a value of $25 million, although it was almost worthless desert land, some of which was not even located in the United States and other parts of which were owned by the government (Tr. 1334, 1512-1516).

The S.E.C. temporarily suspended trading in Select stock between April 2 and 11, 1970, but a short-lived market was reestablished by the end of April. In early May 1970, using the fraudulent balance sheets and a deceptive press release, petitioner Mullenax was able to pledge several thousands shares of Select stock, given to him by Boyd, as collateral for loans totalling $90,000: 20,000 shares to secure $65,000 in loans from the State National Bank of Alabama, 10,000 shares to provide additional collateral on an already outstanding loan from the Home State Bank of MacPherson, Kansas, and 2,000 shares to obtain a $25,000 loan from the Town and Country Business Trust of Wichita, Kansas (Tr. 1647-1676, 1287-1296, 1605-1611). Petitioner Mullenax retained a portion of these loans and disbursed the rest to other members of the conspiracy (Tr. 1029).

ARGUMENT

1. Petitioner Mullenax's principal contention (M. Pet. 6-8) is that the fraudulent pledge of securities as collateral for a loan does not constitute a "sale" within the meaning of Section 17(a) of the Securities Act of 1933, 48 Stat. 84, as amended, 15 U.S.C. 77q(a).[7] The Court has recently denied review of this issue in *United States* v. *Gentile*, 530 F. 2d 461, 466-467 (C.A. 2), certiorari denied, No. 75-6346, June 14, 1976. As we noted

[7]"Sale" is defined by Section 2(3) of the Act, 15 U.S.C. 77b(3), to include "every * * * disposition of a security or interest in a security, for value."

Petitioner's sentence of imprisonment on the counts charging violations of the Securities Act is concurrent with that on his convictions for mail and wire fraud (18 U.S.C. 1341 and 1343) and for conspiracy (18 U.S.C. 371). Thus, a ruling favorable to petitioner on this issue would not affect his sentence. See *Barnes* v. *United States*, 412 U.S. 837, 848, n. 16.

in our Brief in Opposition in that case, petitioner's claims are inconsistent with the language and intent of the Securities Act and, accordingly, have been rejected by every court to have considered this question.[8]

United Housing Foundation, Inc. v. *Forman*, 421 U.S. 837, is not to the contrary. *Forman* involved the issue of whether tenants' shares of so-called "stock" in a co-operative housing project constituted securities under either the Securities Act of 1933 or the Securities Exchange Act of 1934, 48 Stat. 881, as amended, 15 U.S.C. 78a *et seq.* Here, there is no doubt that the Select shares pledged for loans by Mullenax were "securities," as defined in the federal securities laws; the issue, rather, is whether a pledge of those securities as collateral for a loan constitutes a "sale" under Section 17(a) of the Securities Act.[9] Since a pledge is undoubtedly the disposition of an "interest in a security, for value,"

[8]See, *e.g.*, *Securities and Exchange Commission* v. *Dolnick*, 501 F. 2d 1279, 1282 (C.A. 7); *Securities and Exchange Commission* v. *Guild Films Co.*, 279 F. 2d 485, 489 (C.A. 2), certiorari denied *sub nom. Santa Monica Bank* v. *Securities and Exchange Commission*, 364 U.S. 819; *Securities and Exchange Commission* v. *National Bankers Life Ins. Co.*, 334 F. Supp. 444, 456 (N.D. Tex.), affirmed, 477 F. 2d 920 (C.A. 5); *American Bank & Trust Co.* v. *Joste*, 323 F. Supp. 843, 845-846 (W.D. La.). Cf. *Llanos* v. *United States*, 206 F. 2d 852, 854 (C.A. 9), certiorari denied, 346 U.S. 923. We are furnishing petitioner Mullenax with a copy of our brief in *Gentile*.

[9]Petitioner again fails to distinguish between the issues of what is a security and what is a sale of a security in citing *C.N.S. Enterprises, Inc.* v. *G. & G. Enterprises, Inc.*, 508 F. 2d 1354 (C.A. 7); *Lino* v. *City Investing Co.*, 487 F. 2d 689 (C.A. 3); and *Bellah* v. *First National Bank*, 495 F. 2d 1109 (C.A. 5). These decisions all discuss whether promissory notes given in exchange for loans constitute securities. Similarly, *Grenader* v. *Spitz*, 537 F. 2d 612 (C.A. 2), applied *Forman* to another tenants' suit and does not even mention, much less purport to restrict, the court's prior holding in *Gentile*.

and since the legislative history of the Securities Act indicates that Congress intended the term "sale" to be broadly construed to effectuate the statute's remedial purposes (see H.R. Rep. No. 85, 73d Cong., 1st Sess. 11 (1933)), the court of appeals correctly concluded that petitioner's fraudulent transactions constituted a "sale" within Section 17(a) of the Act, 15 U.S.C. 77q(a).[10]

2. Petitioner Mullenax contends (M. Pet. 10-11) that the district court erred in not holding an evidentiary hearing to determine whether information derived from his testimony at a bankruptcy proceeding in 1971 had been utilized in the government's prosecution. Under 11 U.S.C. 25(a)(10), evidence derived from the testimony of a bankrupt at a bankruptcy proceeding may not be used against him in a subsequent criminal action. Petitioner's reliance upon *Kastigar* v. *United States*, 406 U.S. 441, 460, is misplaced, however, for that decision holds only that the government has an "affirmative duty" to prove that its evidence was not obtained, directly or indirectly, from a defendant's immunized testimony. It does not specify the procedures by which

[10]There is no conflict between the position of the Second Circuit in this case and that of the Fifth Circuit in *McClure* v. *First National Bank of Lubbock, Texas*, 497 F. 2d 490, 495 (C.A. 5), certiorari denied, 420 U.S. 930. As we pointed out in our Brief in Opposition in *Gentile*, the Fifth Circuit in *McClure* held only that a pledge of stock was not a "sale" under the Securities Exchange Act, which defines the term more narrowly than does the Securities Act. While Section 3(a)(14) of the 1934 Act, 15 U.S.C. 78c(a)(14), defines "sale" as "any contract to sell or otherwise dispose of" a security, the 1933 Act defines "sale" to include the disposition of an "interest in a security." A pledgee obviously takes a legally enforceable interest in pledged securities. We note in addition that the court in *McClure* acknowledged that a pledge of securities "can constitute a 'sale' in some cases" (497 F. 2d at 495).

this affirmative duty may be satisfied. Here, the trial court determined that the affidavits submitted by the government, together with the transcripts of the grand jury testimony relating to petitioner Mullenax, were sufficient to resolve the issue, and petitioner has offered no reasons why this factual determination was incorrect or why an evidentiary hearing would have aided resolution of the question.[11]

3. One hour after the jury began its deliberations, it requested a copy of the statutes referred to in the conspiracy count of the indictment.[12] Petitioner Mullenax contends (M. Pet. 9-10) that the district court erred in acceding to this request without contemporaneously repeating its original instructions on knowledge, willfulness and intent. But the appropriate response to a jury request rests within the sound discretion of the trial court, and it is clear that petitioner was not prejudiced by the method chosen here.

The jury's request in this case came at the outset of its deliberations, during its consideration of the conspiracy count and only a short time after it had heard the court's detailed instructions on all the elements of the crimes charged. Moreover, a full charge on some of the substantive counts was reread to the jurors a day later, before they returned a verdict on any count.

[11]The district court's opinion (M. Pet. App. C), upon which we rely, amply demonstrates the correctness of its conclusion that the government's case against petitioner was "derived from a legitimate source wholly independent of [petitioner's bankruptcy] testimony." *Kastigar* v. *United States*, *supra*, 406 U.S. at 460. The government's burden of proof under *Kastigar*, of course, is the preponderance of the evidence. *United States* v. *Matlock*, 415 U.S. 164, 177, n. 14; *Lego* v. *Twomey*, 404 U.S. 477, 489.

[12]*I.e.*, 18 U.S.C. 1001, 1341 and 1343; 15 U.S.C. 77e and 77q.

Indeed, the jury's acquittal of petitioner on two counts and its acquittal of seven other defendants on all charges suggests a more discriminating analysis than that attributed to it by petitioner. Finally, several of the crimes with which petitioner was charged manifest on their face a requirement of knowing and intentional activity.[13] By contrast, *Bland* v. *United States*, 299 F. 2d 105 (C.A. 5), on which petitioner primarily relies (M. Pet. 9), involved a statute (8 U.S.C. 1324(1)) that omitted any reference to willfulness or knowledge, and the jury request in that case occurred at a time when the trial court's original instructions could not have been "fresh in the minds of twelve lay jurors." 299 F. 2d at 109. See *United States* v. *Savard*, 493 F. 2d 490, 492 (C.A. 5), certiorari denied, 419 U.S. 896.[14]

4. Petitioner Mullenax claims (M. Pet. 11-12) that the court of appeals' reversal of 42 of the counts on which he was convicted required a remand to the district court for resentencing on the remaining nine counts. As petitioner correctly notes, the Second Circuit has often re-

[13]Section 1001 prohibits "knowingly and willfully" falsifying documents and Sections 1341 and 1343 prohibit "devis[ing] or intending to devise any scheme or artifice to defraud" in connection with the use of mail or wire facilities.

[14]The other cases cited by petitioner (M. Pet. 10) are also distinguishable. In *United States* v. *Bolden*, 514 F. 2d 1301 (C.A. D.C.), the court reversed the conviction because, in response to a specific question relating to the felony murder rule, the trial judge had only repeated the statute and standard instruction without addressing the specifics of the jury's inquiry. *United States* v. *Harris*, 388 F. 2d 373 (C.A. 7), involved a situation in which both the trial court's instructions and reinstructions to the jury had omitted a definition of a necessary element of the crime. *United States* v. *Boerner*, 508 F. 2d 1064 (C.A. 5), certiorari denied, 421 U.S. 1013, noted the Fifth Circuit's prior decision in *Bland*, but distinguished it from the facts of that case.

manded for sentencing reconsideration when some counts of a conviction have been reversed on appeal. The court's use of this remedy has not been indiscriminate, however, and has been applied only when it was thought likely that a count ultimately reversed "might have affected" the sentence on counts ultimately affirmed. See *United States* v. *DeMarco*, 488 F. 2d 828, 833 (C.A. 2). Here, since the counts that were reversed related to the same continuing course of conduct as the nine remaining counts, it seems wholly unlikely that the reversals would have caused the district court to impose a lesser sentence on remand than the short concurrent sentences originally imposed.[15] In any event, even assuming that the court of appeals incorrectly determined (M. Pet. App. 2a) that "[u]nder all the circumstances, it is neither necessary nor appropriate to remand for reconsideration of the sentence imposed," petitioner has a full and adequate remedy in a motion to reduce his sentence under Rule 35, Fed. R. Crim. P.

5. Petitioner Ford's sole contentions (F. Pet. 8-14) are that the evidence at trial showed multiple conspiracies instead of the single conspiracy alleged in the indictment and that the trial court erred in its charge to the jury on this issue. The test for determining whether the evidence established a single conspiracy is "whether there is a common purpose underlying the separate acts, whether the same objective is being pursued in each instance, and whether there is a concerted action to achieve this end." *Koolish* v. *United States*, 340 F. 2d 513, 524 (C.A. 8), certiorari denied, 381 U.S. 951.

[15]Petitioner's initial sentence of two years' imprisonment, most of which was suspended, was substantially lighter than that of his co-defendants, thus evidencing the trial court's awareness of his lesser role in the conspiracy.

Although petitioner Ford argues that he only participated in a portion of the overt acts proven at trial, the essence of a conspiracy is a cooperative effort by several persons to accomplish an unlawful result. As the Court noted in *Blumenthal* v. *United States*, 332 U.S. 539, 559, the crucial question is whether the alleged conspirators had "knowledge of the plan's general scope, if not its exact limits, [and] sought a common end." See also *United States* v. *Cirillo*, 499 F. 2d 872, 887 (C.A. 2), certiorari denied, 419 U.S. 1056; *United States* v. *Perez*, 489 F. 2d 51, 61-62 (C.A. 5), certiorari denied, 417 U.S. 945.

The evidence in this case clearly established that the conspirators' various acts were directed toward the common goal of inflating the worthless Select stock in order to defraud persons selling assets or loaning money. While petitioner claims that he engaged in certain activities without knowledge of the conspiratorial scheme, his participation in backdating key documents, preparing the fraudulent March 26 balance sheet, and lying to the S.E.C. certainly supported the contrary conclusion drawn by the jury.

Furthermore, the trial court correctly instructed the jury that it was required to acquit unless petitioner Ford was shown to have been a member of the conspiracy alleged in the indictment. Petitioner was not entitled to a charge requiring an acquittal merely if more than one conspiracy was proven, because that instruction "fails to take into account the very real possibility that one of the proven conspiracies was the single conspiracy charged." *United States* v. *Tramunti*, 513 F. 2d 1087, 1107 (C.A. 2), certiorari denied, 423 U.S. 832.[16]

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[16]Venue in the prosecution of a criminal conspiracy lies in any district in which an overt act occurred. *Hyde* v. *United States*, 225 U.S. 347, 367. Thus, venue was properly laid in the Southern District of New York, since many of Segal's manipulative efforts occurred there. Contrary to petitioner Ford's contention (F. Pet. 12), the trial court's charge to the jury on this issue was proper. As noted above, the judge instructed that petitioner must be found to have been a member of the conspiracy charged (Tr. 2532) and further instructed that at least one overt act in furtherance of the conspiracy must have been committed by a conspirator in the Southern District of New York (Tr. 2522).

CONCLUSION

It is therefore respectfully submitted that the petitions for a writ of certiorari should be denied.

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